No. 10-1015

In the

Supreme Court of the United States

THOMAS WILLIAMS, ET AL.,

Petitioners,

v.

CHARLES S. RENCHENSKI,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do the Fifth, Sixth, and Fourteenth Amendments entitle a prisoner who was never convicted of a sex offense to due process of law before he is classified as a sex offender and enrolled in a sex offender treatment program?

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CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment states that "No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

2. The Sixth Amendment states that "the accused shall enjoy the right to a . . . trial[] by an impartial jury." U.S. Const. amend. VI.

STATEMENT

The Court of Appeals faithfully applied this Court's decisions to hold that a prisoner who was never convicted of a sex offense is entitled to due process before prison officials add sex offender status and subject him to sex offender treatment programming. In doing so, it came to the same conclusion as every other Circuit that has addressed the question.

Plaintiff-Respondent Charles Renchenski was neither charged nor convicted of a sex offense. Pet. App. 4a. Nor was he enrolled in sex offender treatment during his first twenty years in prison. Pet. App. 6a. In 2003, he was transferred to a new facility and made the mistake of complaining about one prison guard to another. Pet. App. 7a. The first guard, Petitioner Williams, retaliated by marking Respondent down for a host of correctional programming, including three sex offender programs, and by adding sex offender status. *Id.* He did this without the initial risk assessment required under the program guidelines and though Pennsylvania's sex offender treatment program applies only to prisoners with a past conviction for a sex offense. Pet. App. 6a n.3, 7a, 9a, 23a-24a, 91a-100a.

A sex offender designation is perhaps the most stigmatizing label available in the prison context. Sex offenders inhabit the lowest rungs of the prison status hierarchy and are particularly likely to be subject to assault. *See* Allen D. Sapp & Michael S. Vaughn, *The Social Status of Adult and Juvenile Sex Offenders in Prison: An Analysis of the Importation Model*, 6 J. Police & Crim. Psychol. 2, 4 (1990). Other prisoners look down on them as a morally inferior and degraded subclass whom they may hold in contempt. Thus, "having a pariah label such as

sex offender or child abuser" are "[a]ttributes that elevate the likelihood of a person being a victim." Nancy Wolff et al., *Understanding Sexual Victimization Inside Prisons: Factors that Predict Risk*, 6 Criminology and Pub. Pol'y 535, 539 (2007).

By its terms, Pennsylvania's sex offender treatment program ("SOTP") is limited to prisoners who have been adjudged guilty of a sex offense. Pet. App. 6a n.3, 7a, 23a-24a, 91a-100a. Petitioners' suggestion that the programming is intended for those prisoners whose convictions contain a "sexual component," Pet. 3, is an invention for purposes of this litigation; that language appears nowhere in the Department of Corrections Policy for Sex Offender Treatment. Pet. App. 88a-121a. As the Court of Appeals recognized, sex offender programming is not routinely given to other prisoners, Pet App. 23a-24a, nor did Petitioners introduce any contrary evidence below despite heavily supplementing the record with favorable material.

The details of the program are not fully available because the District Court entered summary judgment against Respondent without permitting him to take discovery. Nonetheless, it appears from the publicly available materials that the program is a highly invasive, psychotherapeutic program that involves the use of medication. In particular, all program staff must have training in pharmacological therapy. Pet. 111a.[1]

All of these considerations distinguish sex offender treatment from other prison programming such as alcohol abuse programming or HIV/AIDS education.

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[1] Petitioners cite the Circuit Court's decision for the proposition that their treatment program does not involve medication. *See* Pet. 3 (citing Pet. App. 6a-7a). However, the decision states no such thing.

Those varieties of programming do not identify the participant as the perpetrator of a specific crime (much less a sex crime), do not employ sophisticated psychotherapeutic techniques, and do not impose on participants the same uniquely stigmatizing label.

Given the invasive nature of the treatment program and the concrete and substantial negative consequences that a sex offender designation can have on those in prison, Respondent appealed through the prison hierarchy. At no point did Petitioners convene or obtain a recommendation from a "treatment team." Pet. 4. Nor did they assess or evaluate him or otherwise grant him a hearing. Rather, Petitioner Sidler, the prison's Chief Pyschologist, simply "support[ed] [Petitioner Williams'] decision to add sex offender status" based on a review of the pre-sentence report. Pet. App. 8a.[2]

Respondent therefore filed this Section 1983 action in the Middle District of Pennsylvania. A magistrate recommended that the case be dismissed. After reviewing Respondent's objections and Petitioners' response, the District Court

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[2] The decision below quoted Petitioner Sidler's reference to an evaluation by a "treatment team." That reference appears in a declaration filed in the District Court and is at odds with the documentary evidence. Petitioner Williams simply marked Respondent down for programming, Pet. App. 9a, and Respondent has never been evaluated or assessed under the SOTP – by a "treatment team" or anyone else.

During proceedings in the District Court, Sidler altered Respondent's records to indicate that he had been placed in "Sex Offender Program Evaluation," rather than programming itself. In fact, as Sidler ultimately was forced to concede, Petitioner Williams marked Respondent down for specific programs, not an assessment. Pet. App. 9a. In addition, any assessment Respondent could, in theory, have received would have evaluated his risk level, which governs treatment intensity, not whether he needed treatment in the first instance. *Id.*

determined that there were factual questions outstanding and requested a supplemental filing from Defendants-Petitioners. It then converted the motion to dismiss into a motion for summary judgment. The District Court granted the motion despite Respondent's pending discovery requests and request that a decision be withheld until he was permitted to take discovery. Pet. App. 11a, 45a & n.13.

On appeal, the Court of Appeals for the Third Circuit reversed in pertinent part. It held that the stigma of a sex offender designation combined with psychotherapeutic behavior modification gave rise to a liberty interest created by the Due Process Clause itself. Pet. App. 15a-28a; *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies."). The Court therefore did not reach Respondent's argument that Petitioners would subject him to an "atypical and significant hardship" that gives rise to a liberty interest created by state law under the test announced in *Sandin v. Conner*, 515 U.S. 472 (1995). (Because the treatment does not impact Respondent's eligibility for parole, there is no argument that Pennsylvania's parole statute gives him a state law liberty interest under *Board of Pardons v. Allen*, 482 U. S. 369 (1987).) The Third Circuit affirmed summary judgment on all of Respondent's remaining claims.

REASONS FOR DENYING THE PETITION

I. THERE IS NO DIVIDE BETWEEN THE CIRCUITS

Petitioners' attempt to manufacture a conflict between the Courts of Appeals collapses under scrutiny. Of the eight cases Petitioners identify, five adopt the Third Circuit's position, two address a different question, and one either agrees with the Third Circuit or does not address the question at hand.

As Petitioners concede, the Eleventh Circuit held in *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999), that the stigma of being classified as a sex offender and mandatory sex offender treatment together give rise to a liberty interest under the Due Process Clause, just as the Third Circuit did here. Pet. 8. Petitioners argue that *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), *Chambers v. Colo. Dep't of Corrs.*, 205 F.3d 1237 (10th Cir. 2000), and *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004), stand for a different proposition – that a prisoner has a liberty interest in avoiding sex offender classification and treatment if parole or good time credits are at stake. Pet. 8. Even if Petitioners were correct, those rulings would not conflict with the decision below: that courts have found a liberty interest in cases where parole is at issue does not preclude finding a liberty interest where parole is unavailable.

Moreover, Petitioners misread at least *Neal* and *Coleman*. In both cases, the liberty interest arose from stigma and mandatory treatment alone; though parole was also at stake, it was not essential to the decisions. Notably, both courts recognized a liberty interest on the basis of this Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980), in which parole was not at issue. As the Fifth Circuit

explained, "Applying *Vitek* in the sex offender arena, the Ninth and Eleventh Circuits have held that prisoners who have not been convicted of a sex offense have a liberty interest created by the Due Process Clause in freedom from sex offender classification and conditions. We agree." *Coleman*, 395 F.3d at 222. The Court found that the stigma of a sex offender classification followed by mandatory therapy is "materially indistinguishable from *Vitek*" and therefore concluded that "the Due Process Clause . . . provides Coleman with a liberty interest in freedom from the *stigma and compelled treatment*." *Id.* at 223 (emphasis added).

Similarly, in *Neal* the liberty interest arose out of the stigmatizing consequences of the sex offender label and the resulting mandatory treatment program, not from a state-created interest in parole. *See* 131 F.3d at 828-30. Parole was relevant to the decision because treatment programming was a prerequisite for parole, which made an otherwise voluntary treatment program in effect mandatory. *See Neal*, 131 F.3d at 829. But Hawaii's discretionary parole statute meant that there was no more protected interest in parole than there is in this case. *See id.* at 824 & n.3, 828 (citing *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979)). Indeed, the absence of a protected interest in parole was essential to the panel's conclusion that the plaintiffs could bring their challenge under Section 1983 rather than by seeking a writ of *habeas corpus*. *See Neal*, 131 F.3d at 823-24.

The Tenth Circuit's decision in *Chambers* is a bit murky. While the decision arguably depends on a reduction in good time credits, the court held that "it is the

label replete with inchoate stigmatization . . . which requires some procedural scrutiny." 205 F.3d at 1242. In any event, the *Chambers* panel certainly did not limit the existence of a liberty interest to the facts before it and its ruling therefore does not conflict with the decision below.

By contrast, in *Grennier v. Frank*, 453 F.3d 442 (7th Cir. 2006), the plaintiff alleged a liberty interest arising not from the combination of stigma and sex offender treatment but from the combination of a sex offender label and the denial of his parole. As a result, the Seventh Circuit did not consider the question faced by the Third Circuit: whether stigma and compelled sex offender treatment give rise to a liberty interest. It held that stigma *alone* is insufficient to create a liberty interest under federal law, *see id.* at 445 (rejecting argument that "the stigma of being called a 'sex offender' is enough by itself to deprive a person of liberty or property" because "the shame and humiliation of being called a criminal is not enough by itself to require a hearing under the due process clause"), and that Wisconsin's discretionary parole statute does not create state law liberty interest, *see id.* at 446 ("Grennier does not have a liberty or property interest in the prospect of parole under Wisconsin's discretionary system.").

There is no conflict between those holdings and the decision below, which found a liberty interest not in stigma alone or in parole but in the combination of stigma and compelled treatment. To the extent Petitioners postulate a conflict between *Grennier* and *Chambers*, *Neal*, and *Coleman* on the parole issue, this case does not present the facts on which to resolve it. Nor is there any such divide. Each

of *Chambers*, *Neal*, and *Coleman* relied on a mandatory treatment program, whether or not they also took into account parole.

Petitioners' other two cases do not create a conflict. The Second Circuit in *Vega v. Lantz*, 596 F.3d 77, 81-82 (2d Cir. 2010), recognized the principle that "wrongly classifying an inmate as a sex offender may . . . implicate[] a constitutional liberty interest." The plaintiff's claim failed only because he did not allege that the sex-related allegations were false. *See id.* 82. Absent a false classification, he could establish no injury to reputation and thus no stigma. That approach is consistent with the Third Circuit's.

Nothing in *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003), suggests disagreement with the Third Circuit's holding. *Gunderson* involved a challenge to a state sex offender registry, not a prisoner's challenge to treatment programming. Registering did not implicate a liberty interest because the registry was not publicly disseminated but available only to law enforcement and because the registration requirement had no consequences beyond reputational ones. *See Gunderson*, 339 F.3d at 644. Thus, neither element that the Third Circuit found essential to a liberty interest was present in *Gunderson*, and its refusal to recognize a liberty interest is wholly consistent with the decision below.

Nor have the Second and Fifth Circuits "recognized" Petitioners' purported split. Pet. 9. *Coleman* explained that *Gunderson* addressed a distinct legal question, not that the two decisions disagreed as a matter of law. *See Coleman*, 395 F.3d at 222-23 n.26 (explaining that *Gunderson* was inapplicable because it did not

involve a treatment program). Similarly, *Vega* did not disagree with the reasoning of the other Circuit cases it discussed. Rather, the Second Circuit accepted the principle those cases enunciated – that a liberty interest arises from stigma and compelled treatment – but deemed it inapplicable where the plaintiff made no claim of falsity and thus no claim of stigma. *See Vega*, 596 F.3d at 82.

II. THIS CASE DOES NOT PRESENT ISSUES WORTHY OF THIS COURT'S REVIEW

A. The Decision Below Faithfully Applies this Court's Precedent

The Third Circuit properly applied this Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980), to sex offender treatment programming. Pet. App. 17a-20a. *Vitek* considered a due process challenge to the transfer of a convicted felon to a mental institution. Because the prisoner had been convicted and because prison transfers do not give rise to a liberty interest, *see Meachum v. Fano*, 427 U.S. 215, 224 (1976), he had no liberty interest in avoiding confinement. Nonetheless, the Court held that "'stigma'" and "[c]ompelled treatment in the form of mandatory behavior modification programs" occasion a "loss of liberty" that is "more than a loss of freedom from confinement." *Vitek*, 445 U.S. at 492. While a "criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement," "they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment." *Id.* at 493-94. That holding was reaffirmed in *Sandin v. Conner*, 515 U.S. 472, 479 n.4, 484 (1995).

As the Third Circuit recognized, the stigma of being identified as a sex offender, particularly in the prison context, is at least as substantial as the stigma

of being labeled mentally ill. Pet. App. 18a-19a. And the "psychotherapy" to which Respondent would be subjected in the course of sex offender treatment is the sort of behavioral modification that was at issue in *Vitek*. Pet. App. 19a-20a.

Petitioners do not dispute that the stigma Respondent faces here is comparable to that at issue in *Vitek*. Rather, they argue that sex offender treatment is a more mundane form of behavior modification that is not comparable to the psychiatric treatment at issue in *Vitek* and in this Court's subsequent decision in *Washington v. Harper*, 494 U.S. 210 (1990). Pet. 14-16. Petitioners' argument – in particular, its focus on psychotropic medication – mischaracterizes their own treatment program. While the details are unavailable to Respondent because he has been denied discovery, it is apparent from publicly-available material that the program is a highly-invasive, psychotherapeutic regime of behavior modification that involves medication. Any treatment provider must be trained in psychopathology, psychotherapy, cognitive therapy, and *pharmacological* therapy. *See* Pet. App. 110a-111a (D.O.C. Policy 13.8.1 § 11(D)(2)(c)) (emphasis added). Moreover, the deficient record regarding the psychotherapeutic details of Pennsylvania's treatment program make this case a poor opportunity to decide if sex offender treatment is analogous to the treatment at issue in *Vitek*. *See* below at 14-15.

Nor does *McKune v. Lile*, 536 U.S. 24 (2002), compel a different result. In *McKune*, this Court held that transfer to a different area of the prison and the attendant loss of prison privileges was not so severe a consequence of refusing sex

offender programming as to compel a prisoner to undergo treatment and thereby incriminate himself. *See id.* at 38 (plurality opinion); *id.* at 50-51 (O'Connor, J., concurring in the judgment). Accordingly, the *McKune* plaintiff failed to satisfy the compulsion prong of his self-incrimination claim. *See* U.S. Const. amend. V ("nor shall [any person] be *compelled* in any criminal case to be a witness against himself" (emphasis added)). By contrast, a due process claim turns not on compulsion and the possibility of incrimination but on the existence of a protected liberty interest and a threatened deprivation of that interest without adequate process. *See* U.S. Const. amend. XIV ("nor shall any State deprive any person of . . . liberty . . . without due process of law"). The absence of compulsion within the meaning of *McKune* has no bearing on that inquiry.

Petitioners misunderstand *McKune* when they read it to mean that a due process claim must allege compulsion. The *McKune* plurality proposed that, to constitute compulsion, threatened consequences must involve the sort of "atypical and significant hardship" that would also give rise to a liberty interest under state law. *See McKune*, 536 U.S. at 37-38. It did not suggest that the existence of a liberty interest depends on compulsion. Similarly, Justice O'Connor's opinion allowed a finding of compulsion though the threatened consequences were not so severe as to constitute "atypical and significant hardship," it did not purport to require consequences amounting to compulsion wherever there is a liberty interest. *See id.* at 49-50. Instead, the programming itself may constitute an "atypical and significant hard ship." *See* Pet. App. 24a.

In any event, analogizing compulsion to the "atypical and significant hardship" standard can bear only on liberty interests created by state law (since those are the ones to which the standard applies). *See Sandin*, 515 U.S. at 478 n.4 and 484 (distinguishing between liberty interests arising under state law as opposed to the Due Process Clause itself). Here, the Court of Appeals recognized that Respondent has a liberty interest in avoiding treatment that arises from the Due Process Clause itself. Because the stigma and treatment program give rise to a federally-created liberty interest, there is no need to decide whether the attendant circumstances constitute an "atypical or significant hardship." *See* Pet. App. 24a-25a. A different rule would undermine *Sandin's* distinction between state and federally created liberty interests: there would be no liberty interests under the Due Process Clause unless a prisoner also faced consequences in and of themselves sufficient to create a liberty interest under state law.

B. The Decision Does Not Threaten Proper Administration of Sex Offender Rehabilitation Programs

Pennsylvania's important interest in rehabilitating sex offenders is not implicated here because Respondent was never charged, much less convicted, as a sex offender.[3] In fact, Pennsylvania's sex offender program, by its terms, applies only to those who have been convicted of a sex offense at some point in the past. Pet. App. 91a-100a. As the decision below acknowledges, subjecting prisoners who have not been convicted of a sex offense to sex offender treatment or risk

[3] He is also serving a life sentence without possibility of parole.

assessments is not a routine feature of incarceration in the Commonwealth. Pet. App. 23a-24a.

While States have a valid interest in incarcerating and rehabilitating prisoners for the crimes of which they are convicted, that interest does not allow prison officials to treat prisoners as if they were convicted of a different crime. *Cf. Apprendi v. New Jersey*, 530 U.S. 466 (2000). Requiring due process before Petitioners "add sex offender status" and force Respondent to undergo treatment reserved, under their own policies, for prisoners convicted of a sex offense does not undermine the administration of Pennsylvania's prisons.

Nor does the Third Circuit's holding threaten to interfere with other rehabilitative programming, such as alcohol abuse education. Pet. 11. Unlike sex offender treatment, substance abuse counseling is regularly provided in the prison context to those who have been convicted of other crimes. And even if substance abuse programming were limited to actual offenders, designation as a drug abuser generates much lesser stigma than does designation as a sex offender. Nothing in the decision below suggests that due process is required before inmates are enrolled in substance abuse programming.

III. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT A POOR VEHICLE BY WHICH TO ADDRESS THE QUESTION PRESENTED

This case came on appeal after the District Court asked Petitioners to submit information clarifying factual disputes, transformed their motion to dismiss into a motion for summary judgment, denied Respondent's request to take discovery, and granted the motion. Pet. App. 11a, 45a, 55a-56a. The Third Circuit held that this

was error, but one which was harmless because Respondent succeeded on his due process claim without the benefit of discovery material while his other claims failed as matter of law. Pet. App. 44a-49a.

Notwithstanding the harmlessness of the error for purposes of proceedings in the Court of Appeals, the incomplete record will substantially hamper this Court's review. The heart of Petitioners' claim of error is the assertion that their programming is not so psychotherapeutic as the treatment at issue in *Vitek*. The incomplete record concerning the details of Pennsylvania sex offender treatment therefore goes to the core of the issue proposed for this Court's decision. Similarly, the absence of discovery into the consequences of refusing treatment will prevent full consideration of Petitioners' argument that any treatment is not compulsory.

CONCLUSION

For the foregoing reasons, the Court should not grant a writ of certiorari.

Respectfully Submitted,

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